

1 Andrew J. Sommer, State Bar No. 192844
2 CONN MACIEL CAREY LLP
3 870 Market Street, Suite 1111
4 San Francisco, California 94102
5 Telephone: (415) 268-8881
6 Facsimile: (415) 268-8881
7 asommer@connmaciel.com

8 Kara M. Maciel, Admitted *Pro Hac Vice*
9 CONN MACIEL CAREY PLLC
10 5335 Wisconsin Avenue, NW
11 Suite 660
12 Washington, DC 20015
13 Telephone: (202) 909-2730
14 Facsimile: (202) 827-7904
15 kmaciel@connmaciel.com

16 Attorneys for Defendant,
17 SHAMROCK FOODS COMPANY

18
19 UNITED STATES DISTRICT COURT
20
21 CENTRAL DISTRICT OF CALIFORNIA

22 PAUL REIF, an individual,

23 Plaintiff,

24 v.

25 SHAMROCK FOODS COMPANY,
26 INC., an Arizona Corporation; and
27 DOES 1 to 100, inclusive,

28 Defendants.

CASE NO. 5:15-cv-00636 VAP-SP

**DEFENDANT SHAMROCK FOODS
COMPANY'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Date: February 29, 2016
Time: 2:00 P.M.
Court: 2
Judge: Hon. Virginia A. Phillips

Removal Date: April 7, 2015
Trial Date: May 17, 2016

29 TO PLAINTIFF PAUL REIF AND HIS ATTORNEYS OF RECORD:

30 NOTICE IS HEREBY GIVEN that on February 29, 2016, at 2:00 p.m., or as
31 soon thereafter as counsel may be heard by the above-entitled Court, located at
32

1 3470 Twelfth Street Riverside, CA 92501, in the courtroom of Honorable Virginia
2 A. Phillips, Defendant Shamrock Foods Company (“Defendant”) will and hereby
3 does move the Court for Summary Judgment, or in the alternative, Partial Summary
4 Judgment on the ground that there is no genuine issue as to any material fact and
5 that Defendant is entitled to judgment as a matter of law in its favor and against
6 Plaintiff Paul Reif (“Plaintiff) for the reasons that:

7 1. Plaintiff’s first cause of action for wrongful termination in violation of
8 public policy fails because a) Plaintiff did not engage in protected activity, as he
9 never complained about any alleged violation of the Family and Medical Leave Act
10 (“FMLA”) or the California Family Rights Act (“CFRA”), and there is no
11 underlying violation of law or causal connection to support a wrongful termination
12 claim; b) Plaintiff neither complained that Defendant was violating the law nor had
13 a reasonable, good faith belief that Defendant was violating the law when he
14 inquired into the availability of zero trans-fat margarine for Defendant’s customers,
15 and Plaintiff cannot establish a causal connection between his concern about the
16 sale of trans fat margarine and the termination decision; c) Plaintiff did not have a
17 reasonable, good faith belief that delivering dishwasher soap and cleaning products
18 to a customer violated the law, and Plaintiff presents no evidence to show that the
19 termination decision was motivated by his displeasure about delivering the
20 products; and d) Plaintiff did not engage in protected activity when he requested
21 that Defendant not charge him a floating holiday on a day he was working and
22 Plaintiff presents no evidence to show that he termination decision was motivated
23 by this request.

24 2. Plaintiff’s second cause of action for retaliation in violation of the
25 FMLA, which is properly analyzed as an interference claim in the Ninth Circuit,
26 fails because Plaintiff did not provide Defendant sufficient notice of his intent to
27 take FMLA-qualifying leave simply by taking the remainder of the day off because
28 his daughter was diagnosed with a medical condition and returning to work the very

1 next day. Even if Plaintiff did provide sufficient notice of his intent to take FMLA
2 leave, Plaintiff's retaliation claim fails because he cannot demonstrate that his
3 alleged request was used as a negative factor in the decision to terminate him.

4 3. Plaintiff's third cause of action for retaliation in violation of the CFRA
5 fails because Plaintiff cannot show that he requested CFRA-qualifying leave or any
6 causal link between his alleged request for CFRA-qualifying leave and the
7 termination decision. The termination decision was made prior to Plaintiff
8 disclosing his daughter's condition.

9 4. Plaintiff's fourth cause of action for violation of California Labor
10 Code section 1102.5(c) fails because Plaintiff never refused to participate in
11 unlawful activity. Plaintiff's concerns about whether Defendant's margarine
12 product met California standards and whether he should deliver cleaning products
13 to a customer do not amount to a refusal to participate in unlawful activity.
14 Plaintiff cannot demonstrate that Defendant's conduct was unlawful or that he
15 refused to participate in such conduct. Similarly, Plaintiff's delivery of dishwasher
16 soap and a cleaning product to a customer per his manager's request does not
17 amount to a refusal to participate in unlawful activity. Even if he had engaged in
18 protected activity, there is no causal connection between this episode and his
19 employment termination. Lastly, Plaintiff's request not to be charged a floating
20 holiday on a day in which he worked does not amount to protected activity because
21 he never expressed a belief that Defendant violated the law. Even if Plaintiff could
22 establish that he engaged in protected activity, Plaintiff cannot establish a causal
23 connection between his alleged refusal to participate in unlawful activity and the
24 termination decision. Defendant terminated Plaintiff for a legitimate business
25 reason, namely his poor sales performance and failure to improve after several
26 warnings and being placed on a performance improvement plan.

27 5. Plaintiff's fifth cause of action for intentional infliction of emotional
28 distress (IIED) is preempted by exclusive remedy provisions of the California

1 Workers Compensation Act. Plaintiff's termination, which he alleges is in
2 retaliation of his complaint about Defendant's unlawful business practices and his
3 request for medical leave, is an inherent risk in the normal course of an employment
4 relationship. Notwithstanding the exclusive remedy provisions of the Workers
5 Compensation Act, Plaintiff's IIED claim nonetheless fails because Defendant's
6 decision to terminate Plaintiff does not amount to extreme and outrageous conduct
7 that shocks the conscience.

8 6. Plaintiff's sixth cause of action for failure to indemnify Plaintiff for
9 property damage to Plaintiff's truck, pursuant to California Labor Code section
10 2802(a), fails because Plaintiff was sufficiently compensated for his automobile
11 expenses by Defendant's generous monthly allowance of \$1,2500.00 for expenses
12 associated with using a personal vehicle for work.

13 7. Plaintiff's seventh cause of action for violation of California Labor
14 Code section 224 for improperly deducting wages fails because Plaintiff does not
15 provide any evidence to support his claim that he was not deducted a floating
16 holiday on January 1, 2013.

17 8. Plaintiff's eighth cause of action for violating California Labor Code
18 section 201, which requires payment of final wages upon termination, also fails
19 because he was not deducted a floating holiday on January 1, 2013, when he claims
20 not to have worked.

21 9. Plaintiff's ninth cause of action for violation of California Labor Code
22 section 226, which requires employers to provide employees periodic wage
23 statements containing certain enumerated information, fails because Plaintiff cannot
24 identify any facts to support his claim.

25 This motion is based on this notice of motion and motion, the accompanying
26 memorandum of points and authorities, the declarations of Andrew J. Sommer,
27 Chris Jenkins, Monica Hergert and David Cloud, the separate statement of
28 undisputed facts, the pleadings and papers on file in this action, and upon such

1 other matters as may be presented to the Court at the time of the hearing.

2 DATED: February 1, 2015

CONN MACIEL CAREY LLP

3

4 By: /s/ Andrew J. Sommer

5 Andrew J. Sommer
6 Attorneys for Defendant
7 SHAMROCK FOODS COMPANY

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28